Supreme Court of the United States

OCTOBER TERM, 1951 A. D.

No. 431

TESSIM ZORACH and ESTA GLUCK, ...Appellants

vs.

ANDREW G. CLAUSON, JR.,
MAXIMILIAN MOSS,
ANTHONY CAMPAGNA, HAROLD C. DEAN,
GEORGE A. TIMONE and JAMES MARSHALL,
Constituting the Board of Education
of the City of New York, et al. .....Appellees

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

Brief of J. D. Buckman, Jr., Attorney General, and M. B. Holifield, Assistant Attorney General, for and on behalf of the Commonwealth of Kentucky as amicus curiae.

J. D. BUCKMAN, JR.,
Attorney General of Kentucky
and
M. B. HOLIFIELD,
Assistant Attorney General.

INDEX

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Brief of J. D. BUCKMAN, JR., *Attorney General of Kentucky And* M. B. HOLIFIELD, *Assistant Attorney General, Amicus Curiae*

MAY IT PLEASE THE COURT:

The Attorney General of Kentucky, on behalf of the Commonwealth of Kentucky, joins the Appellees and their amicus curiae in submitting that the judgment of the New York Court of Apeals should be affirmed on the ground that the Statute and rules and regulations adopted pursuant thereto by the New York Commissioner of Education and New York State Board of Education are constitutional and valid as against Appellants' attack on them.

I

STATEMENT

The Commonwealth of Kentucky has a statute, Section 152.220, Kentucky Revised Statutes, which authorizes the

program of release time for religious education to be implemented through parents or guardians of children whose church or churches have sought to establish a program of this nature. Invalidation by this court of the New York Statute and the rules and regulations promulgated pursuant thereto would seriously hinder the educational program as it is evolved in Kentucky. Since the decision in the case of People of the State of Illinois Ex Rel. McCollum v. Board of Education, 333 Ill. 203, 68 S. Ct. 461, 92 L. Ed. 648, the Kentucky program, and it is assumed those of other States has been impaired to a great degree for fear of overstepping the boundaries whatsoever they may be, as outlined in the McCollum decision regarding religious education and the First Amendment to the United States Constitution. It is with this thought that we felt it appropriate to make this short presentation in the present case.

II

ARGUMENT

It is respectfully called to the attention of this Honorable Court that the applicable parts of Section (1) of the Constitution of Kentucky provide:

> "All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned;
>
> First: The right of enjoying and defending their lives and *liberties.*
>
> Second: *The right to worship Almighty God according to the dictates of their consciences.*
>
> Third: The right of seeking and pursuing their safety and *happiness.*
>
> Fourth: The right of *freely communicating their thoughts and opinions.*" (Emphasis ours).

Section 5 thereof, provides:

> "No preference shall ever be given by law to any religious sect, society or denomination; nor to any particular creed, mode of worship or system of ecclesiastical polity; nor shall any person be compelled to attend any place of worship, to contribute to the erection

or maintenance of any such place, or to the salary or support of any minister of religion; *nor shall any man be compelled to send his child to any school to which he may be conscientiously opposed;* and the civil rights, privileges or capacities of no person shall be taken away, or in anywise diminished or enlarged, on account of his belief or disbelief of any religious tenet, dogma or teaching. *No human authority shall, in any case whatever, control or interfere with the rights of conscience.*" (Emphasis ours).

This section recognizes the unquestioned right of the Kentucky parent to control the religious education of his child.

Section 189 of the State Constitution further provides:

"No portion of any fund or tax now existing, or that may hereafter be raised or levied for educational purposes, shall be appropriated to or used by, or in aid of, any church, sectarian or denominational school."

An examination of the foregoing provisions of the Constitution of Kentucky discloses that there is a stronger separation between church and state and a more determined protection granted to each individual in the preservation of his personal liberty, the right of conscience and the protection of his children from any deleterious influence with respect to religion while attending school, and the right and power to communicate his thoughts and opinions to others, than is contained in the First Amendment to the Federal Constitution which provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

But the applicable parts of Subsection (1) of the 14th Amendment to the Federal Constitution provides:

"* * * Nor shall any state deprive any person of life, liberty, or property, without due process of law."

No state has the right to arbitrarily restrict the personal liberty of its citizens in religious matters since the ratification of the 14th Amendment to the Federal Constitution which applies the prohibitions of the First Amendment to the legislatures of the respective states. See Murdock v. Pennsylvania, 319 U. S. 105, 87 L. Ed. 1292.

III.

DEFINITION OF PERSONAL LIBERTY.

The United States Supreme Court in the case of Meyer v. State of Nebraska, 262 U. S. 390, 399, 67 L. Ed. 1042, 1045, in speaking through Mr. Justice McReynolds, said:

IV.

LIMITATIONS OF THE STATE AND FEDERAL GOVERNMENT IN DEALING WITH PERSONAL LIBERTY OF THE CITIZEN

> "Liberty" denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, *to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally,* to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." (Emphasis ours).

In the same case and on page 401 of 262 U. S., and 1046 of 67 L. Ed. again he said:

> "That the state may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally, and morally, is clear; *but the individual has certain fundamental rights which must be respected.* The protection of the Constitution extends to all,—to those who speak other languages as well as to those born with English on the tongue. Perhaps *it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution,—a desir-*

able end cannot be promoted by prohibited means." (Emphasis ours).

V.

THE RIGHT OF THE CITIZEN TO EDUCATE HIS CHILD IN RELIGIOUS MATTERS

Again, in the case of Prince v. Commonwealth of Massachusetts, 321 U. S. 158, 165, 166, 88 L. Ed. 645, 652, the Supreme Court of the United States, in speaking through Mr. Justice Rutledge, said:

> "*The rights of children to exercise their religion, and of parents to give them religious training and to encourage them in the practice of religious belief, as against preponderant sentiment and assertion of state power voicing it, have had recognition here, most recently in West Virginia State Bd. of Edu. v. Barnette,* 319 U. S. 624, 87 L. Ed. 1628, 63 S. Ct. 1178, 147 ALR 674. Previously in Pierce v. Society of Sisters, 268 U. S. 510, 69 L. Ed. 1070, 45 S. Ct. 571, 39 ALR 468, *this Court had sustained the parent's authority to provide religious with secular schooling, and the child's right to receive it, as against the state's requirement of attendance at public schools.* And in Meyer v. Nebraska, 262 U. S. 390, 67 L. Ed. 1042, 43 S. Ct. 625, 29 ALR 1446, children's rights to receive teaching in languages other than the nation's common tongue were guarded against the state's encroachment. *It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.* Pierce v. Society of Sisters, supra. *And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter.*" (Empasis ours).

In this enunciation by this court, the right of the citizen to worship God according to the dictates of his conscience and to teach, or cause his child to be taught that system of worship, cannot be restrained by the State unless the exercise of this protected personal liberty in the way and man-

ner it is being exercised by the citizen threatens immediate disaster to the legitimate program of either the State or Federal Government.

Again, in the case of Pierce v. Society of Sisters of the Holy Name of Jesus and Mary, 268 U. S. 510, 535, 69 L. Ed. 1070, 1078, this court in speaking through Mr. Justice McReynolds, said:

> "As often heretofore pointed out, *rights guaranteed by the Constitution may not be abridged by legislation* which has no reasonable relation to some purpose within the competency of the state. *The fundamental theory of liberty upon which all governments in this Union repose* excludes any general power of the state to standardize its children by forcing them to accept *instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.*" (Emphasis ours).

And, last but not least, in Everson v. Board of Education of the Township of Ewing, et al, 330 U. S. 1, 91 L. Ed. 711, 725, this court, in speaking through Mr. Justice Black, said:

> "State power is no more to be used so as to handicap religions than it is to favor them."

We recognize the fact that the state has the right to see that every citizen is so educated that he will have the ability to and the desire to exercise every activity that will promote the legitimate purposes of the Federal or State government or to protect those governments when they are imperiled by war. But the future citizens of the state and nation are entitled to be instructed in religious matters in harmony with the beliefs of their parents. This is a part of the parents' personal liberties that is protected by the Constitution of the Federal Government and the Constitution of the respective States, and neither the Federal Government nor the State can limit the personal liberty of those

parents in thus teaching their children or having them taught unless the exercise of this liberty at the time and place will endanger the necessary program of the State or Federal Government to the immediate disaster of such program of either the State or the Federal Government.

The rules and regulations adopted by the New York Commissioner of Education and the New York City Board of Education is protecting the parents in exercising personal liberty, protected by both the State and the Federal Constitution in the education of their children in the worship of God according to the dictates of the consciences of the respective parents.

The Appellants are seeking to bar the State of New York from giving this constitutional privilege to its parents. They cannot do so without limiting the personal liberty of those parents. The granting of this privilege does not interfere with any privilege or right of the Appellants. They disclose no danger resulting to either the State of New York or the Federal Government by parents exercising the privilege granted by Appellees. Therefore, the Commonwealth of Kentucky joins the State of New York and the other States who have filed briefs amicus curiae in supporting the judgment of the New York Court of Appeals in the instant case, and we respectfully request the affirmance of the judgment of the court of last resort of New York herein.

Respectfully submitted,

COMMONWEALTH OF KENTUCKY

By: J. D. BUCKMAN, JR.,
Attorney General and

M. B. HOLIFIELD,
Assistant Attorney General.